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No. 87-5449

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANDREWS,

Petitioner,

- v. -

KENNETH V. SHULSEN, Warden, Utah State Prison, and DAVID L. WILKENSEN, Attorney General of the State of Utah,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's Brief in Opposition to the Petition contains substantial distortions regarding the record and the issues presented to the lower courts, necessitating this Reply.

I. ALL THE ISSUES RAISED IN THIS PETITION WERE RAISED IN THE STATE COURTS AND THE FEDERAL COURTS BELOW, AND NONE WERE REJECTED THERE ON THE BASIS OF PROCEDURAL DEFAULT.

Respondent argues at several points in its Brief in Opposition that several of the issues raised in this Petition are raised in this Court for the first time, or that those issues are procedurally barred due to a failure to raise them in state court. Those arguments are false and misrepresent the record in this case. Every legal issue raised in this Petition was raised and decided on the merits in both the state and federal courts,[1] as an examination of the record will show.

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[1]On most of these issues, even Respondent has not previously claimed any procedural default in the lower courts. The Court of Appeals below rejected Respondent's procedural default arguments on the few of the issues raised here on which Respondent made them. See Andrews v. Shulsen, 802 F.2d 1256, 1266 n.8, 1272 n.14 (10th Cir. 1986).

A. The Race Discrimination Claim (Petition, pages 4-14).

Petitioner's claim of race discrimination in his case was first raised in his initial state post-conviction Petition. A copy of that Petition is set out as Appendix B to Respondent's Brief in Opposition. Paragraph 11 of that Petition claimed that Petitioner's conviction violated the Federal Constitution, among other reasons, "because of the strong racial feelings that surrounded his trial ... and the receipt by the jury of a note urging them to 'Hang the Niggers'...." Amended State Habeas Corpus Petition at 3. Paragraph 12(b) of that Petition alleged a pattern of race discrimination in death sentencing in the state of Utah. Id. at 8-9. The Petition was dismissed without an evidentiary hearing the day after it was filed.

In affirming the dismissal, the Utah Supreme Court recognized and rejected on the merits Petitioner's "claim that the death sentence was imposed arbitrarily and as the result of racial discrimination." Andrews v. Morris, 607 P.2d 816, 825 (Utah 1980). The Utah court addressed the merits of this claim, and the others raised in the post-conviction Petition, "[n]otwithstanding the ... determination" the Petition did not show "why relief should be granted, including why the issues raised could not have been raised on appeal." Id. at 607 P.2d 821-822.[2]

Petitioner's federal habeas corpus Petition detailed the factual bases for his discrimination claim at length. A copy of the Amended Petition is included as Appendix C to the Respondent's Brief in Opposition. Paragraph 16 of that Petition alleged that there was a pattern of discrimination in the State

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[2]The Utah Supreme Court's alternative, nonspecific determination that some of the issues in the post-conviction Petition may have been procedurally defaulted was an alternative holding; and it was a holding in which only two of the five Utah Supreme Court Justices concurred. See 607 P.2d at 825 ff. The Court of Appeals thus determined there was no procedural bar to this claim. Andrews v. Shulsen, supra, 802 F.2d at 1266 n.8.

of Utah "against non-white defendants ... and persons who are accused of killing Caucasians", and that "Petitioner's sentences of death were imposed pursuant to this pattern and practice...." Id. at 19. The Petition then went on for three full pages to detail the facts supporting this claim. Id. at 20-23.

Contrary to Respondent's assertions here, the allegations in the federal habeas Petition included specific claims that most jurors were members of the Church of Jesus Christ of the Latter Day Saints "[i]n every capital case in the state of Utah," and that "under the doctrines of that church at the time of the defendant's trial, black people were not considered to be equal to white people." Id. at 21, ¶ 16(E). The Petition also included an allegation that "nonwhite jurors were excluded from the trial of this case by the use of prosecutorial peremptory challenges, by jury selection techniques which excluded from jury eligibility the majority of nonwhite individuals in Weber and Davis County, and the prosecutor's use of challenges to remove prospective black jurors." Id. at 22, ¶ 16(G).

Neither these, nor the other allegations underlying these claims were resolved below.[3] Despite Petitioner's requests that it be required to do so, Respondent never filed an answer which admitted or denied any of these factual allegations. See R. XII 8-9; R. 1386. The District Court first granted an evidentiary hearing on the claim, and then reversed itself and denied one, after permitting the parties to file briefs on "simply new law".

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[3]Respondent's successful efforts to get the District Court to dismiss these claims without developing them explain its misunderstanding of the bases for Petitioner's claims of discrimination in jury selection. See Brief in Opp. at 24-8. The record does not reflect whether, as Respondent implicitly claims, the jury rolls in Davis County were revised after the change in Utah statutory law in 1973. The record does reflect that the only black juror who was empaneled was dismissed by a prosecution peremptory challenge. The juror was James H. Gillespie, Jr., a state police officer who happened to be black. See St. Tr. 255. The state record clearly reflects that Mr. Gillespie was dismissed by the prosecutor's tenth peremptory challenge. St. R. 251.

R. XII:11. Petitioner's counsel was never called upon to proffer what additional evidence he would have presented at an evidentiary hearing. See Proffer, Certr Petition Appendix E at 2-3. But Petitioner's memoranda to the District Court made it clear his proof would include evidence specific to this case:

> The "specific factual instances" alleged in the Petition include ... the racially-prejudicial doctrines of the Church to which virtually all the decisionmakers in this case belonged (id. at ¶ 16 E); the influence of race on public opinion, and the direct communications of racial epithets to the jurors during the trial (id. at ¶ 15 F); the systematic removal of black jurors from the jury in this case (id. at ¶ 15 G) ... among other facts.

R. 1410 n.12.

The District Court's denial of any opportunity for Petitioner to establish these claims was challenged in similar terms in Petitioner's Brief to the Court of Appeals.

> The Petition included extensive allegations of acts of race prejudice in the state proceedings here, from the prosecutor's decision to seek William Andrews' death, to the removal of black people from the jury, to the receipt by the jury of the "Hang the Niggers" note, to the inconsistent positions taken by state prosecuting officials in this case, and those of white murder defendants. R. 1112-15. The allegations even set out the source of this racial prejudice: the doctrines of the Mormon Church, which held that black people were morally inferior. R. 1113.

App. Opp. Br. at 42, Andrews v. Shulsen, 10th Cir. No. 84-2781; see also id. at 39.

> It is difficult to imagine what greater influence race could have in a criminal case, than Petitioner alleged it had here: a racially charged public atmosphere surrounding the trial of these black men in a white community; the systematic removal of non-whites from the jury; prosecutors, jurors, and trial judge who were members of a religious group which held that black life and white life were not of equal worth; the receipt by the jury of a note saying "Hang the niggers." Petition, ¶ 16 E-I. Respondent has never disputed any of these facts.

App. Reply Brief 32.

It is difficult to conceive how an issue, resolved in the courts below on the face of the pleadings, could be better preserved for this Court's review.

B. The Lowenfield v. Phelps Issue (Petition, pages 22-25).

Like Petitioner's state and federal habeas corpus petitions, his certiorari petition here points out numerous aspects in which the statutory scheme under which his death sentence was imposed is inconsistent with the Eighth Amendment principles of Furman v. Georgia, 408 U.S. 238 (1972). Respondent falsely asserts that one aspect of this claim[4]--arising out of the fact that, like the Louisiana statute now before the Court in Lowenfield v. Phelps, No. 86-6867, the Utah sentencing system requires no findings of aggravation beyond the elements of first degree murder--was not previously raised in state or federal court. The record belies that claim.

On direct appeal, Petitioner argued that the Utah statutory scheme violated the Eighth Amendment principles of Furman, in briefs filed both before and after Gregg v. Georgia, 428 U.S. 153 (1976). The Utah Supreme Court rejected that claim on its merits. State v. Andrews, 574 P.2d 709, 710 (Utah 1978).

Petitioner's state post-conviction petitions both pled the unconstitutionality of the Utah statutory system under Furman, and detailed its defects. See State Post-Conviction Petition, ¶ 12(A), Resp. App. B 4-8. One of the details it specified was that in Petitioner's case, and all cases under this statute, "[a]ll factual findings needed to impose a sentence of death were made prior to consideration of the sentence to be imposed...." Id. at ¶ 12(A)(1)(a), Resp. App. B-4. Both the state District Court and the Utah Supreme Court on appeal recognized the post-conviction claim as essentially the same Eighth Amendment challenge that had been raised in Petitioner's direct appeal; see

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[4]Respondent's Brief in Opposition does not even discuss the other aspects of Petitioner's challenge to the Utah statute under Furman, which include Utah's failure to narrow the class of persons eligible for the death penalty, its lack of any requirement that the jury make written findings at sentencing, and its failure to require appellate review of death sentencing decisions. See Certiorari Petition, pages 25-26.

Andrews v. Morris, supra, 607 P.2d at 819 n.9, and rejected it on the merits.

In his habeas corpus petition filed in the federal court below, Petitioner again detailed the numerous defects in the Utah death penalty statute, in support of his claim under Furman. See Second Amended Petition, ¶ 14, Resp. App. C 12-17. Included in that specification was the following claim:

> Utah law gives sentencing authorities the unfettered discretion to choose which convicted murder defendants will be sentenced to death and which will be sentenced to terms of imprisonment. Any first degree murder case is eligible for a death sentence in the state of Utah. The sentencing decision is left wholly to the discretion of the jury, with no requirement of any additional findings to support a sentence of either death or life imprisonment whenever a defendant is found guilty of first degree murder.

Id. at ¶ 14(A), Resp. App. C 12-13 (emphasis added). Petitioner pressed this issue in his memoranda to the District Court:

> Though Utah law speaks of "aggravating circumstances", it defines them only as "includ[ing] those as outlined" as elements of first degree murder. Utah Code Ann. Sec. 76-3-207. This wholly different notion of "aggravating circumstances" requires nothing more in aggravation than the facts necessary to constitute the capital crime itself. Since these Utah "aggravating circumstances" are present in every case in which the defendant is eligible for a death sentence, they cannot serve to guide selection among death-eligible defendants, and provide no "'meaningful basis for distinguishing the ... cases in which [the death penalty] ... is imposed from ... the many cases in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601 (1978).

R. 392; see also R. 1138.

After the District Court upheld the statute, Petitioner argued this to the Court of Appeals, among other things:

> Utah aggravating circumstances do not 'genuinely narrow the class of persons eligible for the death penalty': They simply track the elements of first degree murder.[18]
>
> ---
>
> [18]The Eighth Circuit has recently held this alone is enough to violate the Eighth Amendment.
>
> > '[S]tatutory aggravating circumstances play a constitutionally necessary function at this stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.'

> Zant, 103 S.Ct. at 2743. We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.

Collins v. Lockhart, 754 F.2d 258, 264 (11th Cir. [sic] 1985).

App. Op. Brief at 18, Andrews v. Shulsen, supra; see also id., App. Reply Brief at 12-13. The Court of Appeals rejected this and all aspects of Petitioner's Furman claim on its merits. See Andrews v. Shulsen, supra, 802 F.2d at 1261-2.

C. The Burden of Proof Issue (Petition, pages 27-30).

The claim that, at least under statutes like Utah's, the Federal Constitution requires a jury to be satisfied, beyond a reasonable doubt, of the appropriateness of a death sentence has been part of this case since its outset.

On his direct appeal to the Utah Supreme Court, Petitioner incorporated by reference his co-defendants' arguments "that the failure of the Utah [State] District Court to apply the standard of proof beyond a reasonable doubt violated the due process clauses of the Utah and United States Constitutions." State v. Pierre, 572 P.2d 1338, 1346 (Utah 1977). The Utah Supreme Court rejected this argument in Petitioner's case in light of its decision in Pierre. State v. Andrews, supra, 574 P.2d at 710.

After the Utah Supreme Court changed its position in State v. Wood, 648 P.2d 71 (Utah 1981), at the District Court's direction, Petitioner applied to the Utah Court for relief on this issue again. In denying that application, the Utah Court specifically rejected an argument by Respondent that Petitioner had waived this argument in his previous appeals; it held "that the doctrine of appellate waiver does not bar this action where Petitioner has raised the 'degree of certainty' issue on direct appeal and where the decision whose retroactive application they seek had not been decided before their cases became final. We therefore address the merits of their claim...." Andrews v.

Morris, supra, 607 P.2d at 88.

Petitioner carried this argument into federal court in his Amended Habeas Corpus Petition. That Petition alleged:

> Under Utah law no standards are provided whereby sentencing authorities are to balance the enumerated and unenumerated aggravating and mitigating factors in making a sentencing determination.... Later Utah Supreme Court decisions have changed that burden, but the rule of these cases was not applied by the Utah Supreme Court in this case.

Petition, ¶ 14(D), Resp. App. C 14. The Petition additionally alleged that the sentencing standard applied in this case "does not require proof beyond a reasonable doubt of the appropriateness of the death sentence and the weight of aggravating circumstances, and ... does not otherwise control sentencing discretion in capital cases," and that "absent a standard of proof beyond a reasonable doubt, the Utah death sentencing statute provides no significant check on arbitrariness and discrimination in the imposition of death sentences." Id. at ¶ 17, 17(G), Resp. App. C-23, 25.

Petitioner maintained this point in his Briefs to the Court of Appeals and the District Court below. In Petitioner's Brief to the District Court after Wood, he pointed out that case's requirement of

> an additional, special finding that the jury must unanimously make before imposing a death sentence: that the aggravating circumstances outweigh the mitigating circumstances, and the death sentence is appropriate, beyond a reasonable doubt. We believe the Constitution requires such a finding in all cases. See Ford v. Strickland, 696 F.2d 804, 877-883 (11th Cir. 1983), cert. denied ___ U.S. ___ (1984) (concurring opinion of Judges Anderson and Clark). But even if we are wrong on that, and such a finding is not required in all death penalty proceedings, under this unique statute, which lacks any other substantial controls on jury discretion, its absence makes a critical constitutional difference.

R. 1144. The District Court rejected this claim on its merits, holding:

> the federal Constitution does not mandate such a standard of proof at the selection stage of a capital proceeding, and that the Utah scheme adequately safeguards against the arbitrary imposition of the

death penalty without the underlying Wood standard. Andrews v. Shulsen, 600 F.Supp. 408, 427 (D. Utah 1984).

Petitioner challenged this in the Court of Appeals, again arguing that in the context of the Utah statute, certainty as to the appropriate punishment beyond a reasonable doubt standard is mandated by the Eighth Amendment.

> Woods' rule provided the first semblance of a clear standard for capital sentencing decisions under Utah's law. Although it remains an open question whether a similar standard is required in all capital sentencing schemes by the federal constitution, where there is no other control on jury discretion such a standard is more than a matter of state law. The Utah court was thus right in one respect: federal constitutional rules properly govern the retroactivity question here.

App. Op. Brief, Andrews v. Shulsen, supra, at 28 (footnote and citation omitted); see also id. at App. Rep. Br. 23-24. The Court of Appeals rejected this "direct challenge to the retroactivity analysis of Andrews III" on its merits. See Andrews v. Shulsen, supra, 802 F.2d at 1271.[5]

II. RESPONDENT MISREPRESENTS THE RECORD ON THE EVIDENCE AND FINDINGS REGARDING PETITIONER'S INDIVIDUAL INTENT.

Respondent's Brief in Opposition goes to great lengths to set forth the grisly details of Dale Pierre Selby's crime, for which he has paid with his life. In doing so, it distorts the record regarding and the state court findings on the crucial issue here, William Andrews' "individual culpability" under Enmund v. Florida, 458 U.S. 782 (1982).

Respondent's most significant misrepresentations of the evidence regarding this crime seek to diminish the significance of Petitioner's repeated protests of Selby's actions, and his ultimate withdrawal from the scene before any of the victims were killed. Orren Walker clearly testified that William Andrews "was

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[5]As the quoted language from the Court of Appeals indicates, the thrust of Petitioner's argument on this point was that the Utah Court's refusal to apply Woods' holding retroactively to Petitioner's case violated federal retroactivity principles applicable to decisions affecting the burdens of proof in criminal proceedings. The Court now has pending before it another case raising a similar issue. Yates v. Aiken, No. 86-6060.

disturbed during the whole evening," (St. Tr. 3176-7), and that he was heard to say "I can't do it; I'm scared", not just once, but twice. St. Tr. 3191, 3183. Mr. Walker testified that he first heard Mr. Andrews say this just before or after Selby gave the caustic liquid to each of the victims to drink. St. Tr. 3176-7. Mr. Walker heard Mr. Andrews say the same or similar words a second time, just before he left the scene. St. Tr. 3191, 3193. Nothing in the record suggests, and no court has found, that anyone but Selby had any involvement in the assaults and killings that took place after that time.

Respondent also mischaracterizes the instructions that were given to the jury on the intent with which it had to find Petitioner acted in order to convict. Those instructions went far beyond the Utah statutory definition of first degree murder, to which this Court referred in Enmund, and which Respondent suggests was followed here. Brief in Opp. at 46 n.62. Among the numerous instructions Petitioner's jury was given on this subject was an instruction that told the jury that a defendant is a "party to murder if ... he intentionally rendered active advice during the murder, or ... he intentionally helped the murderer escape from the immediate scene of the crime." Instr. No. 8, R. 352-3; see Resp. App. J. Consistent with this instruction, the prosecutor repeatedly argued to the jury that even "intentionally help[ing] the murderer escape," was sufficient for all purposes:

> [T]his would apply to any of the defendants that you find didn't actually do the killing himself, he would be a party, he instructs, if he intentionally helped plan or assisted in the advancement of the murder with intent that it would take place and did not effectively withdraw before the killing, if he intentionally rendered active advice during the murder, or if he intentionally helped the murderer escape from the immediate scene of the crime, then that person, those persons as parties are also under the law and under Judge Wahlquist's instructions is just as guilty or [sic] murder as the actor.

St.Tr. 3815 (opening argument) (emphasis added).

> Now you have got an instruction on parties and you have also got an instruction on withdrawal or principal. I want you to look at the principal instructions, numbers twelve and thirteen. That is a party, who intentionally helps plan or assist in the advancement of the murder with intent that it would take place and did not effectively withdraw before the killing. That he intentionally rendered active advice during the murder, he intentionally helped the murderers escape from the immediate scene of the crime. That is the party. It does not have to be the one that did it.

St.Tr. 4092-3 (rebuttal argument) (emphasis added). At least,

> [i]n combination with the instructions, the comments of the prosecutor may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury.

California v. Brown, 93 L.Ed.2d 934, 943 (1987) (concurring opinion of Justice O'Connor).

Even in the later, narrower Instruction No. 12, the jury was told that it was enough to find this:

> If a person is a party to a robbery, or rape, or theft, etc., and he is also a party to the killing that may occur therein, only if he knew the killing was planned, or knew it was planned if certain events occur during the crime which does in fact occur, because he has approved conduct containing a contingent plan to kill, or if he knows certain co-parties plan to kill if certain contingencies occur. He would not be a party to such killing if he does not know of a plan to kill and only suspects such an event may possibly occur, but does not seriously expect it.

St.Tr. 357, Resp. App. J. Under this instruction, and the instructions on "withdrawal," the jury could have returned the verdict it did, even if it found William Andrews never participated or assisted in a plan to kill and that he withdrew his physical presence as soon as he learned of Selby's intentions. As soon as he had reason to "seriously expect" Selby would kill, under this instruction William Andrews was a "party" to the murders, however much he opposed them, "unless he effectively withdrew" by "giv[ing] timely warning to the police" or "completely destroy[ing] the effectiveness of his contribution to the commission of the crime." Instr. No. 13, R. 358. That is not the standard this Court approved in Tison v. Arizona, 107 S. Ct. 1676 (1987).

As Respondent's arguments make clear, only one Utah Supreme Court Justice purported at any time to find an "implied jury finding" that defendant personally intended to kill. See Resp. Br. 52, quoting Andrews v. Morris, supra, 607 P.2d at 826 (concurring opinion of Justice Stewart). The Court of Appeals' substitution of his judgment for the state court's was thus doubly flawed. It forgot the principle that

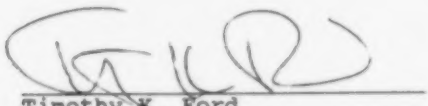
> Even if [a later instruction] ... is read as simply irreconcilable with [an earlier one, the court] ... cannot conclude that the jury followed the second instruction. '... A reviewing court has no way of knowing which of the two irreconcilable instructions the jury applied in reaching their verdict.'

Cabana v. Bullock, 106 S.Ct. 689, 695 n.2 (1986), quoting Francis v. Franklin, 105 S.Ct. 1965, 1975 (1985). And it contravened the holding Tison that such determinations should be made, in the first instance, in state court. Petitioner maintains the case should be remanded so the Court of Appeals can consider it in light of Tison.

CONCLUSION

Petitioner prays that Respondent's false claims of procedural irregularity will not deter this Court from reviewing the substantial and important issues presented by this Petition, on which his life depends.

Respectfully submitted,



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Attorney for Petitioner

November 23, 1987